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# Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?

Jorge L. Carro\*

## I. INTRODUCTION

On June 3, 1983, the Madison, Wisconsin, City Council passed a resolution supporting those churches in the city offering sanctuary to alleged refugees from El Salvador and Guatemala.<sup>1</sup> Since then, approximately twenty municipalities have passed resolutions or ordinances declaring themselves to be, *inter alia*, sanctuaries, thus giving their imprimatur to groups sheltering undocumented aliens from apprehension by the Immigration and Naturalization Service (INS).<sup>2</sup> Executive declarations in three other cities offer similar support for

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1. Madison, Wis., Res. 39,105 (June 7, 1983).

2. Fargo, N.D., Res. Urging Federal Authorities to Grant Extended Voluntary Departure Status to Refugees or Temporarily Suspend Deportation of Refugees from Central America (July 14, 1986); Oakland, Cal., Res. 63950 (July 8, 1986); Rochester, N.Y., Res. 86-29 (May 27, 1986); Davis, Cal., Res. 5407 (Mar. 5, 1986); Los Angeles, Cal., Res. C.F. 85-1948, rescinded by Motion 51 (Feb. 7, 1986); Seattle, Wash., Res. 27402 (Jan. 13, 1986) (repealed on Nov. 4, 1986); San Francisco, Cal., Res. 1087-85 (Dec. 27, 1985); Sacramento, Cal., Res. 85-973 (Dec. 17, 1985); West Hollywood, Cal., Res. 129 (Nov. 25, 1985); Takoma Park, Md., Ordinance 1985-63 (Oct. 28, 1985); Takoma Park, Md., Res. 1985-29 (Oct. 28, 1985); Olympia, Wash., Res. M-1192 (Aug. 30, 1985); Ithaca, N.Y., Res. Sanctuary For Salvadoran and Guatemalan Refugees (July 17, 1985); Cambridge, Mass., Res. Declaring the City a Sanctuary (Apr. 8, 1985); Burlington, Vt., Res. Relating to Support for Efforts to Provide Sanctuary to Refugees Fleeing El Salvador and Guatemala (Apr. 4, 1985); Madison, Wis., Res. 41,075 (Mar. 5, 1985); Minneapolis, Minn., Res. 85R-042 (Feb. 22, 1985); Berkeley, Cal., Res. 52,596 (Feb. 19, 1985); Brookline, Mass., Res. Concerning Sanctuary for Refugees from El Salvador, Guatemala, and Haiti, art. 24 (1985); Duluth, Minn., Res. 84-0485R (July 2, 1984); San Jose, Cal., Res. Concerning U.S. Immigration and Naturalization Service Enforcement Policies (Apr. 24, 1984); Madison, Wis., Res., *supra* note 1.

illegal aliens and those who harbor them.<sup>3</sup> Moreover, two state legislatures and two governors have responded in analogous fashion, with some even proclaiming their states as sanctuary havens.<sup>4</sup>

These municipal and state declarations constitute a different dimension in the six-year sanctuary movement: an ecumenical network opposed to United States policy in Central America which transports and harbors undocumented aliens in the United States.<sup>5</sup> These actions by sanctuary activists are specifically prohibited by the Immigration and Nationality Act (INA), which makes the smuggling, harboring, transporting, or encouraging of illegal aliens a felony.<sup>6</sup> Although closely intertwined with the ecumenical or church sanctuary,<sup>7</sup> this article focuses on the municipal and state aspects of the sanctuary movement.

This article first analyzes the pertinent federal immigration law which addresses the substantive issues raised by these local declarations, with particular attention paid to penalty and enforcement provisions of the INA. Next, the resolutions, ordinances, and proclamations of various municipal and state sanctuary actions are examined. Finally, the rational underpinnings and constitutionality of these declarations are discussed. The article concludes with some

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3. Chicago, Ill., Exec. Order No. 85-1 (Mar. 7, 1985); Detroit, Mich., Exec. Order No. 26 (Sept. 30, 1987); *Koch Memo Directs City Workers Not to Report Illegal Aliens to U.S.*, N.Y. Times, Oct. 18, 1985, at 1, col. 2.

4. NEW YORK STATE ASSEMBLY, RESOLUTION: SANCTUARY FOR GUATEMALANS AND SALVADORANS, Res. 95147-03-6 (June 3, 1986) [hereinafter N.Y. STATE RESOLUTION]; HOUSE OF REPRESENTATIVES OF THE STATE OF NEW MEXICO, A MEMORIAL REQUESTING CONSIDERATION FOR THE REFUGEES FROM EL SALVADOR, 37th Legis., 1st Sess., (House Mem. 5, 1985) [hereinafter N.M. HOUSE MEMORIAL 5]; OFFICE OF THE GOVERNOR OF THE STATE OF NEW MEXICO, SANCTUARY PROCLAMATION (Mar. 28, 1986) (Governor Toney Anaya declares New Mexico a "Sanctuary State") [hereinafter N.M. SANCTUARY PROCLAMATION]; EXECUTIVE DEPARTMENT OF THE COMMONWEALTH OF MASSACHUSETTS, REFUGEE POLICY, Exec. Order No. 257 (Oct. 4, 1985) (Governor Michael Dukakis establishes a refugee policy for The Commonwealth) [hereinafter MASS. REFUGEE POLICY]; see *Assembly Approves Sanctuary Resolution*, United Press Int'l, Albany, N.Y., July 12, 1986 (NEXIS library, Omni file).

5. See Carro, *Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of An Abandoned Ancient Privilege*, 54 U. CIN. L. REV. 747 (1986); Cooper, *Some Cities Battle Administration Over Asylum for Central Americans*, 18 NAT'L J. 150-56 (No. 3, Jan. 18, 1986); Fleming, *The Ethics of Sanctuary*, 1 THE WORLD & I 613 (No. 7, July 1986); Francis, *The Ideology of Sanctuary*, 1 THE WORLD & I 585 (No. 7, July 1986); Ruffin, *The Politics of Selective Compassion*, 1 THE WORLD & I 594 (No. 7, July 1986); *A Symposium on the Sanctuary Movement*, 15 HOFSTRA L. REV. 1 (1986). For a perspective from the leaders and supporters of the sanctuary movement, see I. BAU, *THIS GROUND IS HOLY* (1985); Corbett, *The Social Dynamics of the Sanctuary Movement*, 1 THE WORLD & I 547 (No. 7, July 1986); MacEoin, *Law, Conscience, and the Sanctuary Movement*, 1 THE WORLD & I 573 (No. 7, July 1986); McGuire, *Sanctuary*, 19 INT'L L. & POL. 631 (1987); Riordan, *The Sanctuary Movement: Above the Law or Beyond Its Reach*, 4 HUM. RTS. ANN. 137 (1987).

6. 8 U.S.C. § 1324(a) (1982).

7. See Cooper, *supra* note 5, at 150-56; see *infra* notes 86-87 for municipal expressions of support and commendation for those in the sanctuary movement.

comments on the ramifications of and the dangers posed by these municipal and state actions.

## II. FEDERAL PROHIBITIONS AND STATE ENFORCEMENT

### A. *The Congressional Ban on Concealing, Harboring, or Shielding*

The concealing or harboring of undocumented aliens was first prohibited by an act passed in 1917<sup>8</sup> making it a misdemeanor to conceal or harbor, or attempt to or assist another to conceal or harbor illegal aliens.<sup>9</sup> In 1948, the punishment provision of the 1917 act was vitiated by the Supreme Court in *United States v. Evans*.<sup>10</sup> Although the Court in *Evans* agreed that Congress meant to "make criminal and to punish acts of concealing or harboring,"<sup>11</sup> it found that the statute's ambiguity as to both the scope of the prohibited acts and the penalties proscribed for their violation rendered the law unenforceable.<sup>12</sup>

The section of the 1917 act prohibiting the concealing or harboring of illegal aliens was redrafted in 1952 when the United States Congress enacted the INA.<sup>13</sup> Cognizant of the Supreme Court's holding in *Evans*, Congress modified the penalties for and language prohibit-

8. Act of Feb. 5, 1917, Pub. L. No. 301, 39 Stat. 874. Bringing in or landing or attempts to bring in or land illegal aliens was prohibited by statute in 1907. Act of Feb. 19, 1907, 34 Stat. 897, 900. To "knowingly or willfully hold, or attempt to hold any woman" for purposes of prostitution was first made a felony in 1875. Act of March 3, 1875, 18 Stat. 477.

9. Act of Feb. 5, 1917, Pub. L. No. 301, 39 Stat. 874, 880. This section reads: That any person, including the master, agent, owner, or consignee of any vessel, who shall bring into or land in the United States, by vessel or otherwise, or shall attempt, by himself or through another, to bring into or land in the United States, by vessel or otherwise, or shall conceal or harbor, or attempt to conceal or harbor, or assist or abet another to conceal or harbor in any place, including any building, vessel, railway car, conveyance, or vehicle, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States under the terms of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding \$2,000 and by imprisonment for a term not exceeding five years, for each and every alien so landed or brought in or attempted to be landed or brought in.

*Id.*

10. 333 U.S. 483 (1948).

11. *Id.* at 495.

12. *Id.*

13. The Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1503 (1982). The Act revised and codified existing laws relating to immigration and naturalization. For a thorough analysis of the 1952 Act and the subsequent amendments thereto, see O. TRELLES & J. BAILEY, *IMMIGRATION AND NATIONALITY ACTS, LEGISLATIVE HISTORIES AND RELATED DOCUMENTS* (1979).

ing the concealing or harboring of undocumented aliens.<sup>14</sup> Section 1324(a) of the INA increased the penalty for willfully or knowingly concealing, harboring, or shielding from detection any alien, or attempting to do the same, from a misdemeanor to a felony and increased the possible punishment to either a \$2,000 fine or imprisonment for up to five years or both for each alien involved.<sup>15</sup>

More importantly, Congress also indicated in the redrafted statute who was authorized to make arrests for violations of section 1324. Specifically, section 1324(c) authorizes the enforcement of section 1324(a) by "officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws."<sup>16</sup> The phrase "all other officers whose duty it is to enforce criminal laws"

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14. H.R. REP. NO. 1365, 82d Cong., 2d Sess. 71, reprinted in 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1724. Specifically, the House Report states that the section was modified "in light of the decision of the Supreme Court of The United States in the case of *United States v. Evans* . . ." *Id.* (citation omitted).

15. The Immigration and Nationality Act of 1952, § 274(a) (codified at 8 U.S.C. § 1324(a) (1982)). In its entirety, section 1324(a) reads:

- (a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—
- (1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;
  - (2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;
  - (3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or
  - (4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding \$2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

*Id.* By virtue of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986), a new section 274A was added, making unlawful the employment of aliens.

16. The Immigration of Nationality Act of 1952, § 274(b) (codified at 8 U.S.C. § 1324(c) (1982)). As codified, section 1324(c) reads:

- (b) No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a

reflects Congress's intent to give local police officers the authority to arrest those violating the section 1324(a) prohibition against bringing in, harboring, or shielding undocumented aliens.<sup>17</sup>

Another major piece of immigration legislation passed by Congress, the Refugee Act of 1980,<sup>18</sup> left intact the prohibition against harboring or shielding illegal aliens, as well as the authority of local law enforcement officials to arrest individuals violating these provisions. Subsequent immigration legislation enacted by Congress has not altered the scope of these provisions.<sup>19</sup>

### B. State Enforcement of Federal Immigration Law

Although Congress clearly authorizes local police enforcement of federal immigration law,<sup>20</sup> a standard for arrest under that section has not been promulgated. In situations where a federal standard for arrest is nonexistent, the United States Supreme Court holds that the standard for the validity of an arrest is determined by the law of the state where the arrest takes place.<sup>21</sup>

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member of a class, and all other officers whose duty it is to enforce criminal laws.

*Id.*

17. H.R. CONF. REP. No. 1505, 82d Cong., 2d Sess. 2, reprinted in 1952 U.S. CODE CONG. & ADMIN. NEWS 1357, 1358. Specifically, the Senate version of the bill limited enforcement authority to officers of the United States. A House amendment, however, struck out the words "of the United States" so that "other officers whose duty it is to enforce criminal laws would have authority to make an arrest for a violation of the act." *Id.*; see also *Gonzales v. City of Peoria*, 772 F.2d 468, 475 (9th Cir. 1983); *People v. Barajas*, 81 Cal. App. 3d 999, 1006, 147 Cal. Rptr. 195, 199 (1978).

18. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980). The Refugee Act established a comprehensive refugee resettlement and assistance policy while codifying the right of asylum in the United States. S. REP. No. 256, 96th Cong., 1st Sess. 2, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS, 141, 142.

19. Congress has recently enacted three major pieces of legislation regulating immigration: The Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986), The Immigration Marriage Fraud Amendment Act of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1986), and The Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655 (1986). None of these laws have affected the provisions of section 1324 containing the comprehensive language regarding the harboring of aliens which has been broadly construed by the courts. See *infra* notes 35-53 and accompanying text for court decisions construing section 1324.

20. *Id.*; see also *supra* note 17 and accompanying text.

21. *United States v. Watson*, 423 U.S. 411, 421 (1976); *Ker v. California*, 374 U.S. 23, 39 (1963); *Miller v. United States*, 357 U.S. 301, 305 (1958); *Johnson v. United States*, 333 U.S. 10, 15 (1948); *United States v. Di Re*, 332 U.S. 581, 589 (1948); *United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983); *United States v. Bowdach*, 561 F.2d 1160, 1168 (5th Cir.), *reh'g denied*, 565 F.2d 163 (5th Cir. 1977); *United States v. Swarowski*, 557 F.2d 40, 43 (2d Cir. 1977); *United States v. Leland*, 376 F. Supp. 1193, 1201 (D. Del. 1974); see also 66 Op. Cal. Att'y Gen. 497, 500 (1983). For a discussion of the validity of

Accordingly, in *Gonzales v. City of Peoria*, the Ninth Circuit Court of Appeals analyzed Arizona's misdemeanor statute to determine whether state law authorized local police to enforce the criminal provisions of the INA.<sup>22</sup> In *Gonzales*, eleven plaintiffs of Mexican descent sued the City of Peoria, Arizona, and several Peoria city officials charging that they were unlawfully stopped, questioned, and detained by city police in violation of the fourth and fourteenth amendments to the United States Constitution and the Civil Rights Act of 1871.<sup>23</sup>

Upholding the trial court's judgment for the defendants, the Ninth Circuit first noted that federal law did not preclude local enforcement of the criminal provisions of the INA, including the misdemeanor offenses for which the plaintiffs were previously arrested.<sup>24</sup> The Court then considered whether state law gave the Peoria police authority to arrest the plaintiffs for INA violations.<sup>25</sup> In its analysis, the *Gonzales* court closely examined whether Arizona's misdemeanor statute gave arresting city police discretion to release persons arrested for misdemeanors occurring outside the officer's presence.<sup>26</sup> Concluding that Arizona's statute did give police this discretion, the arrest and custody of plaintiffs for violation of the INA was upheld by the Ninth Circuit and the dismissal of the plaintiff's suit was sustained.<sup>27</sup>

Prior to *Gonzales* a California Court of Appeal, in *People v. Barajas*, rejected the assertion that local police must comply with the INA's warrant requirements instead of state law when arresting suspects for violations of the INA.<sup>28</sup> Like the Ninth Circuit in *Gonzales*, the court in *Barajas* first held that local police officers were not precluded from enforcing the INA. The court further held that Congress left the determination of the validity of state arrests for INA violations to the law of the state in which the arrest occurs.<sup>29</sup> The California court then analyzed whether the local arresting officer

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arrests by local authorities for violations of federal immigration law, see *infra* notes 24-34 and accompanying text.

22. *Gonzales v. City of Peoria*, 722 F.2d 468, 472-73 (9th Cir. 1983).

23. *Id.*

24. *Id.* at 475. The plaintiffs in *Gonzales* were arrested for violating the INA provisions prohibiting the unauthorized entry of aliens as well as those prohibiting reentry by previously deported aliens. See 8 U.S.C. §§ 1325-1326 (1982). The Court of Appeals for the Ninth Circuit held, after reviewing the INA's legislative history, that local police are authorized to enforce sections 1325 and 1326. *Gonzales*, 722 F.2d at 475.

25. *Id.*

26. *Id.* at 476.

27. *Id.*

28. *People v. Barajas*, 81 Cal. App. 3d 999, 1006, 147 Cal. Rptr. 195, 199 (1978). In *Barajas*, local police arrested the defendant for violating INA sections 1325 and 1326. *Id.*

29. *Id.* at 1006-07, 147 Cal. Rptr. at 199.

had "reasonable cause" to arrest the defendant for violating provisions of the INA prohibiting illegal entry after deportation.<sup>30</sup>

These cases illustrate that the validity of local arrests for violating the INA provisions prohibiting the inducing, harboring, or shielding of undocumented aliens turns on the authority granted by each state to local police officers to effectuate arrests for felony violations.<sup>31</sup> In each of the nine states in which municipal or state declarations of sanctuary have occurred,<sup>32</sup> either state statute or common law authorizes police officers, upon reasonable cause, to make warrantless arrests of persons committing a felony, whether or not in the officer's presence.<sup>33</sup> Moreover, statutes in two of these nine states specifically grant immigration and naturalization officers the authority to make warrantless arrests if, *inter alia*, the officer has cause to believe a felony has been committed.<sup>34</sup> In sum, local police officers, through an express grant of authority by Congress, are empowered to enforce section 1324 of the INA, drawing their authority to arrest offenders from state statute or common law.

### C. *The Scope of Activity Proscribed by Section 1324*

Courts broadly construe the section 1324 prohibitions against harboring, shielding, or inducing the entry of illegal aliens in the United

30. *Id.* at 1007, 147 Cal. Rptr. at 199. The Court in *Barajas* subsequently held that the local officers had "ample" probable cause for suspecting a violation of sections 1325 or 1326. *Id.* at 1008, 147 Cal. Rptr. at 200.

31. Unlike sections 1325 and 1326, violations of section 1324 of the INA are classified as felonies, with possible maximum sentences ranging from a \$2,000 fine to five years in prison for each illegal alien so aided. 8 U.S.C. § 1324(a) (1982); *see supra* note 15 and accompanying text.

32. *See supra* notes 1-4 for cities and states making sanctuary declarations.

33. CAL. PENAL CODE § 836 (West 1986); MD. ANN. CODE art. 27, § 594B (Supp. 1988); MINN. STAT. ANN. § 629.34 (West Supp. 1986); N.M. STAT. ANN. §§ 31-1-1 to 1-7 (1978) (The New Mexico statute is interpreted in *State v. Barreras*, 64 N.M. 300, 328 P.2d 74 (1958), *State v. Hudman*, 78 N.M. 370, 431 P.2d 748 (1967), and *City of Roswell v. Mayer*, 78 N.M. 533, 433 P.2d 757, (1967).); N.Y. CRIM. PROC. §§ 140.05, .10 (McKinney 1981); N.D. CENT. CODE § 29-06-15 (Supp. 1987); WASH. REV. CODE ANN. §§ 10.31, .100 (Supp. 1988); WIS. STAT. ANN. § 968.07 (West 1985). In Massachusetts, court decisions have established that police officers are authorized to arrest without a warrant if reasonable influences drawn from observable facts warrant the officer's belief that the defendant had committed, was committing, or was about to commit, a crime. *See Commonwealth v. Ortiz*, 376 Mass. 349, 380 N.E.2d 669 (1978); *Commonwealth v. McShan*, 15 Mass. App. 921, 444 N.E.2d 948 (1983).

34. MINN. STAT. ANN. § 629.34(2) (West Supp. 1986); N.D. CENT. CODE § 29-06-15(2) (Supp. 1987). In Washington, aliens incarcerated in any jail or institution supported by public funds must be reported immediately to U.S. immigration authorities. WASH. REV. CODE ANN. § 10.70.140 (1980).



States. In *United States v. Cantu*,<sup>35</sup> the Fifth Circuit Court of Appeals held that section 1324 prohibits activity “tending substantially to facilitate an alien’s ‘remaining in the United States illegally,’” as well as activity relating to the actual smuggling of aliens.<sup>36</sup> In *Cantu*, the defendant arranged for an illegal alien who worked in his restaurant to leave with a patron through the front door in an attempt to evade INS agents who had arrived to question employees about their residence status.<sup>37</sup> This action was sufficient to uphold the defendant’s conviction for shielding illegal aliens in violation of section 1324.<sup>38</sup>

Similarly, in *United States v. Rubio-Gonzalez*,<sup>39</sup> the Fifth Circuit ruled that merely warning an alien of the presence of immigration officers and thereby aiding his escape is within the scope of activity prohibited by the INA under section 1324.<sup>40</sup> The defendant’s conviction for warning illegal aliens working at a materials company that “immigration is here” was accordingly sustained.<sup>41</sup>

Both the United States Court of Appeals for the Ninth and Second Circuits have construed the word “harbor” to mean “afford shelter to” as opposed to “preventing detection by law enforcement agents.”<sup>42</sup> In the Ninth Circuit case of *United States v. Acosta de Evans*,<sup>43</sup> the defendant was arrested when immigration officials found five aliens, at least one of whom she knew was in the country illegally, living at her apartment.<sup>44</sup> The court held that the purpose of section 1324 of the INA was to “keep unauthorized aliens from entering or remaining in the country.”<sup>45</sup> It found that “this purpose is best effectuated by construing ‘harbor’ to mean ‘afford shelter to.’”<sup>46</sup>

In the Second Circuit case of *United States v. Lopez*<sup>47</sup> the defendant provided shelter in several single family residences to twenty-seven aliens he knew to be illegally in the country.<sup>48</sup> The defendant also helped some of the aliens obtain employment by filling out their job applications, transporting them to and from work, and also ar-

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35. 557 F.2d 1173 (5th Cir. 1977).

36. *Id.* at 1180 (citing with approval *United States v. Lopez*, 521 F.2d 437 (2d Cir.), *cert. denied*, 423 U.S. 995 (1976)).

37. *Id.* at 1175.

38. *Id.* at 1180.

39. 674 F.2d 1067 (5th Cir. 1982).

40. *Id.* at 1072.

41. *Id.* at 1070.

42. *United States v. Acosta De Evans*, 531 F.2d 428, 429-30 (9th Cir. 1976); *United States v. Lopez*, 521 F.2d 437, 441 (2d Cir.), *cert. denied*, 423 U.S. 995 (1975).

43. 531 F.2d 428 (9th Cir. 1976).

44. *Id.* at 429.

45. *Id.* at 430 (emphasis in original).

46. *Id.*

47. 521 F.2d 437 (2d Cir.), *cert. denied*, 423 U.S. 995 (1975).

48. *Id.* at 439, 441.

ranging sham marriages for them.<sup>49</sup> As in *Acosta de Evans*, the Second Circuit Court of Appeals held that the "harboring" prohibition of section 1324 was "intended to encompass conduct tending substantially to facilitate [a known] alien's 'remaining in the United States illegally.'"<sup>50</sup> The Court also indicated that simply providing shelter might be prohibited by the INA.<sup>51</sup>

Inducing and encouraging wrongful entry into the country is prohibited by section 1324, even if such acts take place abroad. For example, in *United States v. Nunez*,<sup>52</sup> the First Circuit held the defendant criminally liable for acts of inducing or encouraging the unlawful entry of illegal aliens into the United States even though these actions took place in the Dominican Republic.<sup>53</sup>

In general, the scope of section 1324 has been construed by the courts to cover activity which *substantially facilitates* the entry or stay of illegal aliens in the United States. Warning undocumented aliens of the presence of law enforcement officers, providing them with housing, and inducing them to enter the country have specifically been held violative of section 1324's prohibition against shielding, harboring, or inducing illegal aliens. In particular, the entire gambit of activities by those engaged in the sanctuary movement, from transporting undocumented aliens to sheltering and concealing them from detection by INS officials is clearly prohibited by section 1324 of the INA. The focus will now turn to the declarations of local and state governments regarding the sanctuary movement, both with respect to their factual basis and their constitutionality in light of section 1324's prohibition.

### III. THE FORM AND SUBSTANCE OF SANCTUARY DECLARATIONS

#### A. *An Overview*

Although the illegality of the sanctuary movement is beyond question, as of September 1987, twenty-one city councils, three mayors, two state legislatures, and two governors have issued sanctuary declarations or their equivalent.<sup>54</sup> In contrast, lost amid the publicity surrounding these actions is the fact that one city has rescinded and

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49. *Id.* at 439.

50. *Id.* at 441.

51. *Id.*

52. 668 F.2d 10, 12 (1st Cir. 1981).

53. *Id.*

54. See *supra* notes 1-4 and accompanying text. For a discussion of the contents of these resolutions, see *infra* notes 62-133 and accompanying text.

revised a prior declaration,<sup>55</sup> one city sanctuary declaration has already been withdrawn by its sponsor after opposition was manifested,<sup>56</sup> and still another has been defeated.<sup>57</sup> Moreover, one sanctuary resolution was actually repealed by voters in November 1986.<sup>58</sup> Only one city thus far has officially opposed the sanctuary movement with an antisanctuary resolution;<sup>59</sup> however, several governors have stated their opposition to the concept of state sanctuary.<sup>60</sup>

Although by no means a pressing concern on the agenda of local government,<sup>61</sup> the sanctuary declarations are an example of state government actions in areas heretofore considered the exclusive domain of the federal government. Since their propriety is questionable at best, and their constitutionality highly suspect at worst, the factual basis for and operative provisions of these sanctuary declarations merit close analysis.

## B. *The Municipal Declarations*

### 1. The Method

The municipalities that have promulgated sanctuary declarations have done so either through resolutions<sup>62</sup> or ordinances.<sup>63</sup> In general, ordinances are measures which prescribe a permanent rule of conduct or government,<sup>64</sup> while resolutions are acts of temporary character.<sup>65</sup> The courts, however, commonly hold that the name af-

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55. Los Angeles, Cal., Res., *supra* note 2.

56. *Mayor Withdraws Sanctuary Resolution*, United Press Int'l, Austin, Tex., Apr. 18, 1986 (NEXIS library, Omni file).

57. Fogarty, *Council Kills Sanctuary Resolution*, Des Moines Reg., Apr. 29, 1986.

58. *Seattle 'Sanctuary' Declaration Defeated*, United Press Int'l, Nov. 6, 1986 (national desk distribution) (NEXIS library, Omni file). Commenting on the rejection of the sanctuary movement by the voters, Roger Conner, executive director of the Washington-based Federation for American Immigration Reform, stated that "[l]ocal officials should look at the facts before endorsing the views of small political groups advocating illegal immigration and defiance of federal law." *Id.*

59. Monterey Park, Cal., Res. 9004 (June 5, 1986).

60. United Press Int'l, Phoenix, Ariz., May 1, 1986 (NEXIS library, Omni file) (Arizona Governor Bruce Babbitt declines to declare Arizona a sanctuary); Enda, *Lamm, Sanctuary Activists Clash on Refugee Issue*, Rocky Mountain News, Apr. 6, 1986 (Colorado Governor Richard Lamm blasts American cities granting sanctuary to Central American refugees).

61. Although urged to do so by sanctuary proponents, the National League of Cities, an association of cities formed to represent their collective interests, has not seen fit to include it on the agenda of its annual meetings, nor has the Association of Local County Commissioners. DeSimone, *Seattle Took Similar Initiative Step Further*, Ann Arbor (Mich.) News, Apr. 1, 1986.

62. See, e.g., Madison, Wis., Res., *supra* note 1; Berkeley, Cal., Res., *supra* note 2.

63. See, e.g., Takoma Park, Md., Ordinance, *supra* note 2.

64. See, e.g., C. RHYNE, *THE LAW OF LOCAL GOVERNMENT OPERATIONS* 115 (1980); 2 C. SANDS & M. LIBONATI, *LOCAL GOVERNMENT LAW* § 11.14 (1981).

65. See, e.g., C. RHYNE, *supra* note 64, at 115; C. SANDS & M. LIBONATI, *supra* note 64, § 11.14.

fixed to a measure is not dispositive,<sup>66</sup> but instead focus on the method by which the motion was enacted to determine its legal validity.<sup>67</sup> For example, if a resolution is passed which meets the requirements applicable to ordinances, it can be enforceable as an ordinance.<sup>68</sup>

The majority of municipal sanctuary declarations are passed in accordance with voting formalities and attested to by city clerks.<sup>69</sup> In addition, testimony prior to enacting the declarations often occurs,<sup>70</sup> while in other instances, amendments to the sanctuary declarations are offered and accepted.<sup>71</sup> At the very least, municipalities having passed sanctuary resolutions or ordinances did so with the formality required of official enactments.

## 2. The Preambles

All of the municipal declarations begin with several preamble clauses which state the reasons for the measure's enactment and the objectives it seeks to attain.<sup>72</sup> Despite purporting to be the result of "independent" actions,<sup>73</sup> the similarities between preambles of various cities is striking; some preambles are verbatim replicas of another municipality's preamble.<sup>74</sup>

The preambles to most municipalities' sanctuary declarations have several common characteristics, although not necessarily in common

66. See, e.g., R. OSBORNE, LOCAL GOVERNMENT LAW § 61 (1982); C. RHYNE, *supra* note 64, at 115; C. SANDS & M. LIBONATI, *supra* note 64, § 11.14.

67. R. OSBORNE, *supra* note 66; C. RHYNE, *supra* note 64, at 115; C. SANDS & M. LIBONATI, *supra* note 64, § 11.14.

68. R. OSBORNE, *supra* note 66; C. SANDS & M. LIBONATI, *supra* note 64, § 11.14.

69. See, e.g., Oakland, Cal., Res., *supra* note 2; Davis, Cal., Res., *supra* note 2; Los Angeles, Cal., Res., *supra* note 2; Seattle, Wash., Res., *supra* note 2; San Francisco, Cal., Res., *supra* note 2; West Hollywood, Cal., Res., *supra* note 2; Cambridge, Mass., Res., *supra* note 2; Minneapolis, Minn., Res., *supra* note 2; Berkeley, Cal., Res., *supra* note 2.

70. See, e.g., Cooper, *supra* note 5, at 150, 154; *Reagan Policy Toward Central America Attacked*, United Press Int'l, Los Angeles, Cal., June 30, 1986 (NEXIS library, Omni file); Ostrom, *Sanctuary Favored, But Panel Hears Critics*, Seattle Times, July 25, 1985.

71. See, e.g., Fargo, N.D., Res., *supra* note 2; Los Angeles, Cal., Res., *supra* note 2; Burlington, Vt., Res., *supra* note 2; Duluth, Minn., Res., *supra* note 2.

72. BLACK'S LAW DICTIONARY 1058 (5th ed. 1979).

73. Helton, *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy*, 21 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 493, 582 (1986); see also Takoma Park, Md., Res., *supra* note 2, at 3; Cambridge, Mass., Res., *supra* note 2, at 2; Brookline, Mass., Res., *supra* note 2, at 24-3.

74. See *infra* notes 76-80, 82 and accompanying text for those portions of sanctuary resolutions which are exact replicas of one another.

sequence. Many declarations refer to the city's or nation's immigration heritage.<sup>75</sup> Also common are references to the United Nations Declaration of Human Rights. For example, municipal resolutions will often cite the United States' support of the United Nations General Assembly's adoption of the Universal Declaration of Human Rights on December 10, 1948, which commits the member states to recognize and observe basic human rights.<sup>76</sup> Many municipal preambles also refer to the Fourth Geneva Convention relating to the protection of civilians in time of war. For example, Sacramento's resolution states: "[T]he United States, Guatemala and El Salvador, have ratified on August 12, 1949, the Geneva Convention IV, relative to the PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR."<sup>77</sup> Some refer as well to The Refugee Act of 1980:

WHEREAS, The United States Refugee Act of 1980 authorizes the grant of asylum to refugees who are defined in terms identical to the United Nations 1968 Convention as any person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside of the country of his nationality and is unable or, owing to such fear, is unwilling to avail him or herself of protection of that country."<sup>78</sup>

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75. See, e.g., Rochester, N.Y., Res., *supra* note 2, at 1; Los Angeles, Cal., Res., *supra* note 2, at 3; San Francisco, Cal., Res., *supra* note 2, at 1; West Hollywood, Cal., Res., *supra* note 2, at 1; Burlington, Vt., Res., *supra* note 2, at 2; Brookline, Mass., Res., *supra* note 2, at 24-3. In other resolutions, references to the nation's refugee heritage is made in the operative clause. See, e.g., Seattle, Wash., Res., *supra* note 2, at 2. Some municipal declarations even compare the sanctuary movement to the underground railroad that helped slaves escape to the North from the pre-Civil War southern states. See Rochester, N.Y., Res., *supra* note 2, at 1; Oakland, Cal., Res., *supra* note 2, at 2.

76. E.g., Oakland, Cal., Res., *supra* note 2, at 1; Sacramento, Cal., Res., *supra* note 2, at 1; Olympia, Wash., Res., *supra* note 2, at 1; Minneapolis, Minn., Res., *supra* note 2, at 1. Resolutions in Ithaca and Rochester also refer to the United Nations Declaration of Human Rights in virtually the same manner. Compare Rochester, N.Y., Res., *supra* note 2, at 1, with Ithaca, N.Y., Res., *supra* note 2, at 1. For resolutions merely alluding to the United Nations Declaration of Human Rights, see Takoma Park, Md., Ord., *supra* note 2, at 1; Duluth, Minn., Res., *supra* note 2, at 1.

77. E.g., Sacramento, Cal., Res., *supra* note 2, at 1; Olympia, Wash., Res., *supra* note 2; Minneapolis, Minn., Res., *supra* note 2, at 1. For similar references to the Geneva Convention, see Oakland, Cal., Res., *supra* note 2, at 1; San Francisco, Cal., Res., *supra* note 2, at 1; Takoma Park, Md., Res., *supra* note 2, at 3; Ithaca, N.Y., Res., *supra* note 2, at 2; Duluth, Minn., Res., *supra* note 2, at 1. See generally Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 (Geneva Convention IV), *in force*, Oct. 21, 1950, 6 U.S.T. 3516, T.I.A.S. No. 3365.

78. E.g., Sacramento, Cal., Res., *supra* note 2, at 1; Olympia, Wash., Res., *supra* note 2, at 1; Minneapolis, Minn., Res., *supra* note 2, at 1. Resolutions in Ithaca and Rochester also refer to the Refugee Act of 1980 in exactly the same manner. Compare Ithaca, N.Y., Res., *supra* note 2, at 2, with Rochester, N.Y., Res., *supra* note 2, at 1. Other similar references to the Refugee Act can be found in Oakland, Cal., Res., *supra* note 2, at 1; Davis, Cal., Res., *supra* note 2, at 1; Los Angeles, Cal., Res., *supra* note 2, at 5; Seattle, Wash., Res., *supra* note 2, at 1; San Francisco, Cal., Res., *supra* note 2, at 1; West Hollywood, Cal., Res., *supra* note 2, at 1; Takoma Park, Md., Res., *supra* note 2, at 2; Cambridge, Mass., Res., *supra* note 2, at 1; Burlington, Vt., Res., *supra* note 2, at 1; Madison, Wis., Res., *supra* note 2, at 1; Brookline, Mass., Res., *supra* note 2, at 24-2; Duluth, Minn., Res., *supra* note 2, at 2. See generally The Refugee Act of 1980, 8 U.S.C. § 1101(a)(42) (1982).

The 1968 Refugee Protocol is also commonly noted in many municipal sanctuary declarations:

WHEREAS, the United States has acceded to the 1967 United Nations Convention in protocol relating to the status of refugees which states "No contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his/her life or freedom would be threatened on account of his race, religion, membership of a particular social group or political opinion."<sup>79</sup>

Frequently mentioned by these declarations is the low percentage of asylum applicants given refugee status<sup>80</sup> and the alleged number of civilians killed in either El Salvador or Guatemala or both.<sup>81</sup> Some municipal declarations assert the dangers deportees face upon return to their country of origin.<sup>82</sup> While some preambles mention refugees from countries other than El Salvador,<sup>83</sup> not one sanctuary declara-

79. *E.g.*, Sacramento, Cal., Res., *supra* note 2, at 1; Olympia, Wash., Res., *supra* note 2, at 1; Minneapolis, Minn., Res., *supra* note 2, at 1. For other similar references to the 1968 Refugee Protocol, see Rochester, N.Y., Res., *supra* note 2, at 1; San Francisco, Cal., Res., *supra* note 2, at 1; Takoma Park, Md., Res., *supra* note 2, at 2; Ithaca, N.Y., Res., *supra* note 2, at 2; Burlington, Vt., Res., *supra* note 2, at 1; Duluth, Minn., Res., *supra* note 2, at 1-2. See generally U.N. Protocol Relating to the Status of Refugees, *opened for signature*, Jan. 31, 1967, 19 U.S.T. 6260, T.I.A.S. No. 6577, 606 U.N.T.S. 268.

80. "WHEREAS, the United Nations High Commission on Refugees has recognized that persons fleeing El Salvador and Guatemala are bona fide political refugees, yet fewer than two percent are being granted that status by the U.S. Immigration Service . . ." See, *e.g.*, Davis, Cal., Res., *supra* note 2, at 1; Madison, Wis., Res., *supra* note 2, at 1. For similar references to asylum applications, see also Oakland, Cal., Res., *supra* note 2, at 1; Seattle, Wash., Res., *supra* note 2, at 1; West Hollywood, Cal., Res., *supra* note 2, at 1; Takoma Park, Md., Res., *supra* note 2, at 2-3; Ithaca, N.Y., Res., *supra* note 2, at 2; Cambridge, Mass., Res., *supra* note 2, at 1; Burlington, Vt., Res., *supra* note 2, at 1; Brookline, Mass., Res., *supra* note 2, at 2; Duluth, Minn., Res., *supra* note 2, at 2.

81. See, *e.g.*, Davis, Cal., Res., *supra* note 2, at 1; Sacramento, Cal., Res., *supra* note 2, at 2; West Hollywood, Cal., Res., *supra* note 2, at 1; Duluth, Minn., Res., *supra* note 2, at 2; Ithaca, N.Y., Res., *supra* note 2, at 2.

82. The resolutions of Sacramento and Minneapolis contain the exact same phraseology: "WHEREAS, in 1982 and 1983 over 4,800 refugees were returned to El Salvador and that the names of 50 of those returned have turned up on lists of victims killed by security forces or death squads . . ." Sacramento, Cal., Res., *supra* note 2, at 2; Minneapolis, Minn., Res., *supra* note 2, at 1. For other references to alleged persecution of deportees upon their return to their country of origin, see Oakland, Cal., Res., *supra* note 2, at 1; Davis, Cal., Res., *supra* note 2, at 1; West Hollywood, Cal., Res., *supra* note 2, at 1; Takoma Park, Md., Res., *supra* note 2, at 2; Cambridge, Mass., Res., *supra* note 2, at 1-2; Brookline, Mass., Res., *supra* note 2, at 24-2.

83. For resolutions or ordinances mentioning Guatemala in addition to El Salvador, see generally Fargo, N.D., Res., *supra* note 2; Davis, Cal., Res., *supra* note 2; Seattle, Wash., Res., *supra* note 2; San Francisco, Cal., Res., *supra* note 2; Sacramento, Cal., Res., *supra* note 2; West Hollywood, Cal., Res., *supra* note 2; Takoma Park, Md., Ordinance, *supra* note 2; Olympia, Wash., Res., *supra* note 2; Ithaca, N.Y., Res., *supra* note 2; Burlington, Vt., Res., *supra* note 2; Minneapolis, Minn., Res., *supra* note 2;

tion specifically mentions Nicaragua or Cuba.

According to these preambles, the justifications for these sanctuary resolutions can be categorized as follows: first, the United States is obligated to respect its international responsibility not to deport refugees;<sup>84</sup> second, the United States' continuing deportation of Salvadoran and Guatemalan refugees due to the failure of the INS to grant these aliens asylum is unconscionable and violative of international law;<sup>85</sup> third, the courageous citizens who are providing sanctuary to these refugees exemplify those adhering to the law, their conscience, and this nation's heritage;<sup>86</sup> and finally, the sanctuary movement is deserving of municipal support and encouragement.<sup>87</sup>

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Berkeley, Cal., Res., *supra* note 2; Madison, Wis., Res., *supra* note 2. For resolutions mentioning countries in addition to Guatemala and El Salvador, see generally Oakland, Cal., Res., *supra* note 2 (Haiti, South Africa); Cambridge, Mass., Res., *supra* note 2 (Haiti); Brookline, Mass., Res., *supra* note 2 (Haiti). The now-rescinded Los Angeles resolution contained a reference to Guatemala which was deleted before passage, Los Angeles, Cal., Res., *supra* note 2 (committee version of Nov. 22, 1985).

84. See *supra* notes 78-79 and accompanying text.

85. See *supra* note 80 and accompanying text; see also Helton, *supra* note 73, at 588. "The unarticulated but pervasive theme of these local actions is that the *federal government*, particularly the INS and the executive branch is acting outside of the law—not the local governments or the Sanctuary Workers." *Id.* (emphasis in original). For municipal references to the legal and moral justifications of the sanctuary movement, see *infra* note 86.

86. See, e.g., Oakland, Cal., Res., *supra* note 2, at 2 (noting that "members of these religious communities offering sanctuary [do so] in the belief that they are acting in accordance with international and federal law"); Davis, Cal., Res., *supra* note 2, at 1 (claiming that "churches and synagogues and other groups across the nation have elected to provide sanctuary openly and publicly to Central American refugees, believing this humanitarian work to be in accord with the spirit and letter of international and United States law"); Seattle, Wash., Res., *supra* note 2, at 1 (stating that "Seattle citizens who have provided sanctuary . . . have done so in an open and public fashion, believing as a matter of conscience that this is a necessary and humanitarian action"); Sacramento, Cal., Res., *supra* note 2, at 2 (declaring that "these groups and individuals [protecting and supporting refugees] have acted in a way they consider morally and legally correct"); Takoma Park, Md., Res., *supra* note 2, at 3 (stating that "other community organizations have publicly declared themselves sanctuaries . . . as public witness against the morally and legally unjustifiable deportation of these people"); Olympia, Wash., Res., *supra* note 2, at 2 (proclaiming that "it respects the various sanctuary groups . . . for their courage, sensitivity, humanity and willingness to act in accordance with their conscience"); Burlington, Vt., Res., *supra* note 2, at 2 (asserting that "groups and individuals have acted in a way they consider morally and legally correct and in the best tradition of our country"); Berkeley, Cal., Res., *supra* note 2, at 1 (stating that "groups and individuals have acted in a way they consider morally and legally correct and in the best tradition of our country").

87. See, e.g., Oakland, Cal., Res., *supra* note 2, at 3 (resolving that "the City Council commends the residents of Oakland who are providing health, food, shelter and other settlement assistance and friendship to Central American refugees, and commends . . . groups which have already declared public sanctuary for refugees from Central America"); Rochester, N.Y., Res., *supra* note 2, at 1-2 (stating that "the City of Rochester wishes to continue supporting its citizens in their efforts to maintain and further human rights for its citizens and for all who come within its borders . . . [and] recognizes that Rochester has become a 'City of Sanctuaries' underscoring both the historical and present effort by numerous communities within Rochester to provide shelter to many fleeing conditions of persecution in their homelands"); Davis, Cal.,

### 3. The Operative Clauses

The operative clauses of municipal sanctuary declarations, which follow the preambles, consist of several common elements. First, they usually contain a general declaration of the city as a "sanctuary city,"<sup>88</sup> "city of refuge,"<sup>89</sup> or even "a city of peace."<sup>90</sup> In addition, many municipalities officially give their support to federal "Extended Voluntary Departure" (EVD) status for Salvadoran and Guatemalan refugees.<sup>91</sup>

Many of the municipal declarations also include a series of orders prohibiting city employees and departments from requesting<sup>92</sup> or disseminating<sup>93</sup> information concerning the citizenship or residency sta-

Res., *supra* note 2, at 2 (resolving that the "City of Davis commend the Davis Religious Community for Sanctuary"); Seattle, Wash., Res., *supra* note 2, at 3 (proclaiming that "the City of Seattle recognizes the courage and personal conviction that has caused many of its residents to offer sanctuary to Central American refugees"); San Francisco, Cal., Res., *supra* note 2, at 2 (noting that "the City and County of San Francisco commend the Congregations and Religious Orders who have declared sanctuary"); Takoma Park, Md., Res., *supra* note 2, at 4 (applauding "the actions of Takoma Park residents who have acted to help Salvadoran and Guatemalan refugees in the City . . . and stands in solidarity with churches and other organizations throughout the country who have provided public sanctuary for Central American refugees"); Burlington, Vt., Res., *supra* note 2, at 2 (resolving that the "City of Burlington supports the principle of sanctuary"); Berkeley, Cal., Res., *supra* note 2, at 1-2 (commending "the . . . groups which have declared public sanctuary . . . [and expressing] its support for any other group which chooses to declare public sanctuary for Central American refugees"); Madison, Wis., Res., *supra* note 1 (commending "St. Francis House . . . for their compassion and moral courage in providing sanctuary to refugees from El Salvador and Guatemala").

88. See, e.g., Rochester, N.Y., Res., *supra* note 2, at 2; Los Angeles, Cal., Res., *supra* note 2, at 3-5; Sacramento, Cal., Res., *supra* note 2, at 3; Ithaca, N.Y., Res., *supra* note 2, at 3; Cambridge, Mass., Res., *supra* note 2, at 3; Brookline, Mass., Res., *supra* note 2, at 24-1.

89. See, e.g., Oakland, Cal., Res., *supra* note 2, at 2; Seattle, Wash., Res., *supra* note 2, at 2; San Francisco, Cal., Res., *supra* note 2, at 3; Takoma Park, Md., Res., *supra* note 2, at 4.

90. Olympia, Wash., Res., *supra* note 2, at 2.

91. See, e.g., Fargo, N.D., Res., *supra* note 2, at 467; Rochester, N.Y., Res., *supra* note 2, at 2; Los Angeles, Cal., Res., *supra* note 2, at 4-5; Seattle, Wash., Res., *supra* note 2, at 2; San Francisco, Cal., Res., *supra* note 2, at 2; Sacramento, Cal., Res., *supra* note 2, at 3; West Hollywood, Cal., Res., *supra* note 2, at 2; Takoma Park, Md., Res., *supra* note 2, at 4; Olympia, Wash., Res., *supra* note 2, at 2; Ithaca, N.Y., Res., *supra* note 2, at 3; Minneapolis, Minn., Res., *supra* note 2, at 2; Duluth, Minn., Res., *supra* note 2, at 3.

92. See, e.g., Oakland, Cal., Res., *supra* note 2, at 3; Sacramento, Cal., Res., *supra* note 2, at 3; West Hollywood, Cal., Res., *supra* note 2, at 2; Takoma Park, Md., Ordinance, *supra* note 2, at 1; Ithaca, N.Y., Res., *supra* note 2, at 3.

93. See, e.g., Oakland, Cal., Res., *supra* note 2, at 3; Sacramento, Cal., Res., *supra* note 2, at 3; Takoma Park, Md., Ordinance, *supra* note 2, at 1; Cambridge Mass., Res., *supra* note 2, at 3.



tus of any person, or investigating, or assisting in the investigation of such matters<sup>94</sup> without legal authority. Also prohibited by numerous sanctuary declarations is the conditioning of municipal benefits or services on residency status without authorization.<sup>95</sup> Furthermore, municipalities often request the INS to notify third parties such as sanctuary organizations should aliens be arrested in proclaimed sanctuaries.<sup>96</sup> Finally, some declarations at the end of the operative clauses contain a severance clause which preserves the validity of the declaration should one part be held legally invalid.<sup>97</sup>

### C. *Municipal Executive Orders*

New York City and Chicago have promulgated executive actions akin to municipal sanctuary declarations. In an October memorandum, New York Mayor Edward I. Koch directed city agencies not to report illegal aliens to the INS "unless the alien has given signed permission for a status check or the alien appears to be engaged in some kind of criminal behavior."<sup>98</sup> The October memorandum also ordered city officials to prepare publications for law abiding illegal aliens detailing services available to them.<sup>99</sup>

Even more similar in tone to municipal sanctuary declarations is the executive order given by Chicago Mayor Harold Washington.<sup>100</sup> Using the same phraseology found in many municipal sanctuary declarations,<sup>101</sup> the executive order prohibits city employees and departments from requesting information about,<sup>102</sup> disseminating

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94. See, e.g., Oakland, Cal., Res., *supra* note 2, at 2-3; Davis, Cal., Res., *supra* note 2, at 1; Sacramento, Cal., Res., *supra* note 2, at 3; West Hollywood, Cal., Res., *supra* note 2, at 1; Takoma Park, Md., Ordinance, *supra* note 2, at 1; Ithaca, N.Y., Res., *supra* note 2, at 3; Berkeley, Cal., Res., *supra* note 2, at 2; Brookline, Mass., Res., *supra* note 2, at 24-1.

95. See, e.g., Oakland, Cal., Res., *supra* note 2, at 3; Davis, Cal., Res., *supra* note 2, at 1; Sacramento, Cal., Res., *supra* note 2, at 3; West Hollywood, Cal., Res., *supra* note 2, at 1; Takoma Park, Md., Ordinance, *supra* note 2, at 1. Cf. Los Angeles, Cal., Res., *supra* note 2, at 4; Rochester, N.Y., Res., *supra* note 2, at 2.

96. Ithaca, N.Y., Res., *supra* note 2, at 3; Minneapolis, Minn., Res., *supra* note 2, at 2; Duluth, Minn., Res., *supra* note 2, at 4.

97. Oakland, Cal., Res., *supra* note 2, at 4; Seattle, Wash., Res., *supra* note 2, at 3-4; Takoma Park, Md., Ordinance, *supra* note 2, at 2; Cambridge, Mass., Res., *supra* note 2, at 4.

98. *Koch Memo Directs City Workers Not to Report Illegal Aliens to U.S.*, N.Y. Times, Oct. 18, 1985, at 1, col. 2.

99. *Id.* Patrick F.X. Mulhearn, counsel to the mayor, denies that the October Memorandum is a sanctuary policy. *Id.*

100. Chicago, Ill., Exec. Order, *supra* note 3.

101. See *supra* notes 92-94 and accompanying text for municipal sanctuary declarations prohibiting city employees from requesting information about, disseminating information regarding, or investigating or assisting in the investigation of the citizenship status of any person without legal authority.

102. Chicago, Ill., Exec. Order, *supra* note 3, § 3.

information regarding,<sup>103</sup> or investigating or assisting in the investigation of<sup>104</sup> the citizenship or residency status of any person without legal authority. The order also prohibits the conditioning of city benefits on citizenship or residency status<sup>105</sup> in a manner analogous to many municipal sanctuary declarations.<sup>106</sup> Additionally, the executive order mandates that applications, questionnaires, and interview forms used by the city be reviewed in order to delete any questions regarding citizenship or residency status not legally required.<sup>107</sup>

#### *D. State Legislative Actions*

Currently, two legislatures have passed resolutions analogous to municipal sanctuary declarations. On June 3, 1986, New York's State Assembly passed a resolution declaring New York a sanctuary for Salvadoran and Guatemalan refugees.<sup>108</sup> Like many municipal sanctuary declarations, New York's declaration commends the actions of citizens, churches, and others who provide asylum to Central American refugees.<sup>109</sup> Additionally, the Assembly's resolution asks state employees not to say or do anything that could lead to the deportation of refugees who are abiding by state laws<sup>110</sup>—just as similar mu-

103. *Id.* § 4.

104. *Id.* § 3.

105. *Id.* § 5.

106. See *supra* note 95 and accompanying text.

107. Chicago, Ill., Exec. Order, *supra* note 3, § 6.

108. N.Y. STATE RESOLUTION, *supra* note 4.

109. *Id.* Specifically, the resolution reads: "Resolved, that the State of New York commend the congregations, religious orders and citizens who have provided asylum for Salvadorans and Guatemalans . . ." *Id.* The New York Assembly's resolution also replicates clauses found in many municipal declarations. The Assembly refers, for example, to the United Nations Convention Relating to the Status of Refugees, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, and the United States Refugee Act of 1980. *Id.*; see *supra* notes 76-78 and accompanying text. The New York Resolution also alludes to the low percentage of asylum applicants given refugee status, as well as to EVD status for Guatemalan and Salvadoran refugees. *Id.*; see *supra* notes 80, 91 and accompanying text. Interestingly, the New York Resolution quotes the inscription on the Statue of Liberty. *Id.* Governor Toney Anaya of New Mexico also quoted the Statue of Liberty's inscription a little more than two months earlier in his sanctuary proclamation. See N.M. SANCTUARY PROCLAMATION, *supra* note 4, at 1. Furthermore, the New York Resolution refers to a statement made by Salvadoran Archbishop Oscar Romero on May 23, 1980; a statement also quoted in New Mexico's Sanctuary Proclamation. See N.Y. STATE RESOLUTION, *supra* note 4; N.M. SANCTUARY PROCLAMATION, *supra* note 4, at 1.

110. N.Y. STATE RESOLUTION, *supra* note 4. Specifically, the resolution states: Resolved, that this assembled body urge the Governor and all chief administrative officers to encourage commissions and departments under their respective jurisdictions not to promote or tolerate any discrimination of Salvadorans

nicipal declarations.<sup>111</sup>

New Mexico's state legislature also passed a sanctuary resolution, although it differs in focus from New York's.<sup>112</sup> Entitled "Requesting Consideration for the Refugees From El Salvador," the New Mexico resolution focuses exclusively on Salvadoran refugees who have illegally entered the United States and are facing deportation.<sup>113</sup> The resolution's preamble replicates many municipal sanctuary declarations by noting the number of persons killed in El Salvador's political turmoil as well as alleging that deportees face imprisonment, persecution, torture, and death upon return to their country of origin.<sup>114</sup> Finally, like many municipal declarations, the resolution officially lends support to federal EVD status for Salvadorans in the United States.<sup>115</sup>

### *E. State Executive Actions*

In addition to state legislative action, the governors of two states have also addressed the sanctuary movement. In Massachusetts, Governor Michael S. Dukakis issued an executive order,<sup>116</sup> while in New Mexico, former Governor Toney Anaya issued a sanctuary proclamation.<sup>117</sup>

Dukakis's executive order contains clauses essentially mirroring those found in municipal sanctuary declarations. As with analogous municipal declarations, the executive order makes reference to the Commonwealth's immigration and refugee heritage.<sup>118</sup> Similarly, Dukakis's executive order also refers to the Refugee Act of 1980,<sup>119</sup>

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and Guatemalans because of their immigration status, or to jeopardize their welfare by doing or saying anything that would lead to their deportation.

*Id.*

111. For examples of the similarity of restrictions on government employees found in municipal sanctuary declarations and the New York State Assembly's sanctuary declaration, compare N.Y. STATE RESOLUTION, *supra* note 4 with resolutions found *supra* notes 92-94.

112. N.M. HOUSE MEMORIAL 5, *supra* note 4.

113. *Id.*

114. *Id.* For similar references to Salvadoran casualties and asserted dangers faced by deportees, see *supra* notes 81-82 and accompanying text.

115. *Id.* For municipal declarations supporting EVD status for Salvadorans illegally in the United States, see *supra* note 91 and accompanying text.

116. MASS. REFUGEE POLICY, *supra* note 4.

117. N.M. SANCTUARY PROCLAMATION, *supra* note 4.

118. MASS. REFUGEE POLICY, *supra* note 4, at 1. Specifically the executive order notes: "[T]he Commonwealth has been a home and a haven for immigrants and refugees since the beginning of its recorded history . . ." *Id.* For municipal sanctuary declarations referring to a city's or nation's immigration policy, see *supra* note 75 and accompanying text.

119. *Id.* The Executive Order states:

WHEREAS, the United States Refugee Act of 1980, Pub. L. No. 96-212, authorizes the grant of asylum to refugees who are defined as any person outside his or her country of nationality "who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that

as well as mandating that employees, agents, or agencies of the Commonwealth shall not "request information about, investigate, or assist in the investigation of the citizenship or residency status of any person" without legal authority.<sup>120</sup> As is also common in many municipal declarations, the order contains a prohibition against the conditioning of benefits, opportunities, or services on citizenship or residency status without legal authorization.<sup>121</sup>

Furthermore, the Massachusetts executive order also designates the Massachusetts Office of Refugee Resettlement (MORR) as the state agency responsible for refugee affairs in the state,<sup>122</sup> and appoints the MORR administrator as the State Refugee Coordinator.<sup>123</sup> The executive order further establishes a Refugee Resettlement System,<sup>124</sup> and mandates how and when state agencies conducting programs and activities directly or indirectly related to servicing the needs of refugees are to undertake an affirmative planning process regarding those refugees.<sup>125</sup>

New Mexico Governor Anaya's sanctuary proclamation, unlike Governor Dukakis's executive order, openly proclaims his state to be a "State of Sanctuary" for Central American refugees.<sup>126</sup> However, like its Massachusetts counterpart, it mirrors the provisions of many municipal sanctuary resolutions. For instance, Anaya's proclamation also contains a reference to the nation's immigration heritage,<sup>127</sup> and likens the sanctuary movement to the underground railroad of the Civil War era.<sup>128</sup> In addition, Anaya's declaration, like so many municipal resolutions, refers to the Refugee Act of 1980,<sup>129</sup> as well as the

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country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

*Id.*; see also 8 U.S.C. § 1101(a) (1982). Similar references to the Refugee Act of 1980 can be found in municipal sanctuary resolutions, *supra* note 78 and accompanying text.

120. MASS. REFUGEE POLICY, *supra* note 4, art. IV, § 4.1. For similar municipal sanctuary declarations, see *supra* notes 92-94 and accompanying text.

121. *Id.* For those municipal sanctuary declarations which prohibit the conditioning of benefits or services on residency status, see *supra* note 95 and accompanying text.

122. *Id.* art. I, § 1.1.

123. *Id.* art. I, § 1.2.

124. *Id.* art. II.

125. *Id.* art. III.

126. N.M. SANCTUARY PROCLAMATION, *supra* note 4, at 3.

127. *Id.* at 1. For municipal sanctuary declarations that contain similar references to the nation's immigrant heritage, see *supra* note 75 and accompanying text.

128. *Id.* See *supra* note 75 for municipal sanctuary declarations which also compare the sanctuary movement with the pre-Civil War underground railroad.

129. *Id.* at 2.

1968 Refugee Protocol.<sup>130</sup> The proclamation singles out Salvadoran refugees in the preamble, as did the state legislature's resolution of the previous year;<sup>131</sup> and as with many municipal declarations, the proclamation commends sanctuary proponents and those working to extend "sanctuary" to "those in need."<sup>132</sup> The motivation behind Governor Anaya's proclamation is identical to that of municipal resolutions—it is the INS (and not those providing sanctuary) who is guilty of violating the law.<sup>133</sup>

#### IV. ARGUMENTUM AD CAPTANDUM: THE PROBLEMS WITH SANCTUARY DECLARATIONS

As previously discussed, the act of encouraging or providing sanctuary to illegal aliens is a felony punishable by up to five years incarceration.<sup>134</sup> Nonetheless, municipalities, states, mayors, and governors have officially indicated their support of the sanctuary movement in various ways.<sup>135</sup> This section discusses the legal ramifications of these official imprimaturs of the sanctuary movement.

##### A. Federal Preemption of Sanctuary Declarations

The constitutionality of local sanctuary promulgations is suspect on several grounds, the first and most obvious one being their preemption by federal immigration law under the supremacy clause of the United States Constitution.<sup>136</sup> Guidance from judicial decisions establishing the parameters of the preemption doctrine is far from concise due to the complex and varied relationships between state and local governments and federal law.<sup>137</sup> Despite this ambiguity, exploring preemption in the context of sanctuary declarations is possible

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130. *Id.*

131. *Id.* For discussion of the New Mexico legislature's action concerning Salvadoran refugees, see *supra* notes 112-115 and accompanying text.

132. *Id.* at 3. This portion of the proclamation states:

BE IT FURTHER RESOLVED, that the State of New Mexico commends those civic and religious organizations, and the compassionate and dedicated individual volunteers assisting these organizations, who are working in New Mexico and throughout this country to extend the spirit of "sanctuary" to all those in need.

*Id.*

133. Governor Anaya stated that:

These religious people that are involved in sanctuary are trying to uphold the law, and if this movement is characterized successfully so, as a movement of lawbreakers, then it will fail. But I hope that one of these days the morality of this country will rise and recognize that it's the INS that's breaking the law and not those that are behind the sanctuary movement.

*Nightline: Interview with Toney Anaya, Governor of New Mexico* (ABC television broadcast, Apr. 1, 1986).

134. See *supra* notes 6, 15 and accompanying text.

135. See *supra* notes 54-133 and accompanying text.

136. See *infra* notes 144-152 and accompanying text.

137. See, e.g., *Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n*,

using past Supreme Court decisions which construed local laws dealing with immigration and foreign affairs.

### *B. State Laws Regarding Immigration*

In the watershed case of *DeCanus v. Bica*,<sup>138</sup> the Supreme Court was asked to decide whether the INA preempted a California labor law. The law at issue prohibited an employer from knowingly employing illegal aliens if such employment adversely affected lawful resident workers.<sup>139</sup> The Court found that the California law was not per se preempted by the INA merely due to the fact that the state statute dealt with aliens.<sup>140</sup> To the contrary, the Supreme Court concluded, after analyzing California's rationale for passing the statute, that preemption was not required due to either the "nature of the . . . subject matter" or because "Congress ha[d] unmistakably so ordained" that result.<sup>141</sup> Accordingly, the Court held that the California statute was local regulation with a purely speculative and indirect impact on federal immigration laws.<sup>142</sup>

### *C. Sanctuary Declarations and Immigration Law*

Unlike the state legislation at issue in *DeCanus*, sanctuary declarations directly address matters which encompass the regulation of immigration. The Supreme Court describes the regulation of immigration as "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain," a determination which is "unquestionably exclusively a federal power."<sup>143</sup>

Many sanctuary declarations refer specifically to the "illegal" regulatory procedures utilized by the INS in eliminating the admissibility of aliens as being their purpose for passing the resolution or ordinance.<sup>144</sup> These resolutions also commend those in the sanctuary movement who illegally bring undocumented aliens across the border and shelter them.<sup>145</sup> In addition, many of the declarations prohibit

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476 U.S. 355, 368-69 (1986) (Supreme Court identifies six various situations in which state and local action may be preempted by federal law under the supremacy clause).

138. 424 U.S. 351 (1976).

139. *Id.* at 352.

140. *Id.* at 355.

141. *Id.* at 356.

142. *Id.*

143. *Id.* at 354-55.

144. *See supra* notes 80, 85 and accompanying text.

145. *See supra* notes 86-87 and accompanying text.

city employees from aiding or cooperating with INS officials.<sup>146</sup> These factors clearly facilitate the stay of illegal aliens in the United States by improving their chances of evading apprehension by federal law enforcement officials. Prohibiting all city or state employees from cooperating with the INS, officially encouraging those sanctuary activists illegally rendering assistance to undocumented aliens, and encouraging illegal aliens to remain in the country by holding out their jurisdiction as areas where such aliens may seek refuge has prevented the federal government from adjudicating the status of many illegal aliens.<sup>147</sup>

The sanctuary resolutions and declarations thereby operate to impede federal immigration procedures by simultaneously regulating the matter locally and effectively determining for many aliens their ability to stay in the country and under what conditions.<sup>148</sup> These resolutions and declarations are thus preempted by federal immigration law, which grants the authority to determine who may remain in the country only to federal immigration authorities.<sup>149</sup>

Aside from being preempted due to their regulatory impact on

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146. See *supra* notes 92-96 and accompanying text.

147. The resolution in Brookline, Massachusetts, actually states that it is the municipality's hope that the resolution's "practical effects will encourage refugees to come to our town, to take advantage of our sanctuary and our good will." Brookline, Mass., Res., *supra* note 2, at 24-4. Alan C. Nelson, Commissioner of the INS, has declared that "sanctuary resolutions and publicity by church groups cannot help but encourage illegal aliens to come to the United States in the false belief that they have a basis of support here, and may in fact even be safe from apprehension in some areas." Nelson, *The Sanctuary Movement: Humanitarian Action, Political Opposition or Lawlessness*, VITAL SPEECHES OF THE DAY, June 1, 1986, at 482 (Vol. LII, no. 16). Mr. Harold Ezell, Western Regional Commissioner of the INS, stated during deliberations on Los Angeles's short-lived sanctuary resolution that "regardless of the resolution's purpose or content, [it] would be received as an open invitation by the rest of the world to seek a better way of life in Los Angeles as a safe haven from the INS." H. Ezell, Minutes of the Los Angeles Intergovernmental Relations Committee Report 2 (Nov. 27, 1985) (Item 22, CF 85-1948).

148. Sanctuary activists have estimated that since the sanctuary movement officially began in March, 1982, it has prevented the INS from apprehending between 1000 and 1400 "refugees." Glickman, *How Genuine Are Refugee Claims of Persecution?*, The Christian Sci. Monitor, Sept. 25, 1986, at 32, col. 4.

149. The United States Supreme Court has held local or state statutes invalid under the supremacy clause if they conflict with federal law or *stand as an obstacle* to the accomplishment of the full purposes and objectives of Congress. See, e.g., *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 260 (1985); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1983); *Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n*, 476 U.S. 355, 368-69 (1986). The strong federal interest in preventing illegal immigration was once again manifested in the institution of employer sanctions for hiring illegal aliens found in the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3360, (1987). By preventing the INS from adjudicating whether an illegal alien may enter the country and under what conditions he may remain, sanctuary declarations effect a "regulation of immigration" as defined by the Court in *De Canas v. Bica*, 424 U.S. 351 (1976). These declarations frustrate the immigratory scheme adopted by Congress and enforced by the INS and are therefore preempted by the supremacy clause.

aliens within their borders and the obstacles they pose for the accomplishment of congressional objectives, some local sanctuary resolutions are void because they squarely conflict with what Congress has duly permitted. As previously noted, several ordinances and resolutions prohibit local government employees from requesting or disseminating information concerning the citizenship or residency status of any person or assisting in the investigation of such matters without authorization.<sup>150</sup> These local prohibitions are violated in situations where a city or state employee might cooperate with federal authorities by assisting with securing the arrest or conviction of those sanctuary movement activists violating section 1324(a) of the INA which prohibits the shielding, harboring, or inducing of illegal aliens into the country.<sup>151</sup>

A direct conflict between federal law and local sanctuary declarations occurs when state or local law enforcement officials violate the local prohibitions against cooperation with federal authorities. Congress expressly grants to local law enforcement authorities the power to arrest those sheltering illegal aliens in violation of section 1324. Accordingly, if a state authorizes police officers to make warrantless arrests of those who commit felonies, local and state law enforcement officials may do so for a violation of section 1324.<sup>152</sup> Any conflicting local ordinances or resolutions are void under the supremacy clause when in direct conflict with what Congress has unmistakably ordained.<sup>153</sup>

#### *D. Asserted Legitimacy*

Proponents of sanctuary declarations and some sanctuary apologists have asserted that local sanctuary resolutions or ordinances are mere symbolic gestures. They argue the declarations are compatible with local interests in that they provide procedures for distributing city services, preserve state or city fiscal resources, or relate to local

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150. See *supra* notes 92-107 and accompanying text.

151. For the text of 8 U.S.C. § 1324(a), see *supra* note 15.

152. See *supra* notes 8-34 and accompanying text for the legislative history of the INA and its express grant of authority to state and local officials to enforce section 1324.

153. State or local law is preempted under the supremacy clause when an outright or actual conflict between federal and state law arises. See, e.g., *Free v. Bland*, 369 U.S. 663, 666 (1962); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 21 (1824). For example, in *Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986), the Third Circuit Court of Appeals invalidated a local ordinance prohibiting importation of nuclear waste due to its preemption under the supremacy clause by the Federal Atomic Energy Act of 1954. *Id.* at 1109.



law and order.<sup>154</sup>

These rationales are not, however, very persuasive. The sanctuary declarations expressly state that the current INS procedure for regulating illegal aliens is the major factor in and motive for their passage.<sup>155</sup> Assuming that their purported purpose is to provide procedures for distributing city services renders the declarations overbroad. If this were truly their purpose, then the orders prohibiting city employees and departments from requesting or disseminating information about, or investigating or assisting in the investigation of the citizenship or residency status of any person are superfluous. Instead, the resolution need only prohibit the conditioning of municipal or state services on residency status.<sup>156</sup>

It is also argued that these symbolic gestures are protected by the first amendment.<sup>157</sup> Far from being protected by the first amendment, however, sanctuary declarations may run afoul of it since they constitute possible violations of state and city employee's free speech rights.

#### *E. First Amendment Implications*

The prohibitions found in many sanctuary declarations banning city or state employee cooperation with the INS unconstitutionally interfere with the civil employee's right to aid federal law enforcement officials. In *In re Quarles & Butler*,<sup>158</sup> the Supreme Court recognized the right of every citizen to cooperate with federal law enforcement officials should they so desire. In *Quarles*, several defendants were convicted of conspiracy to injure, oppress, threaten, and intimidate Henry Worley for exercising a right and privilege secured to him by the Constitution and the laws of the United States.<sup>159</sup> Mr. Worley had informed a United States deputy marshal that the defendants were violating the Internal Revenue Code by not posting the required bond for operating a distillery.<sup>160</sup>

The defendants argued on appeal that there existed no such right

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154. See, e.g., Helton, *supra* note 73, at 583 (sanctuary resolutions ensure health and welfare of inhabitants); Comment, *City Sanctuary Resolutions and the Preemption Doctrine: Much Ado About Nothing*, 20 LOY. L.A.L. REV. 513, 535-56, 554 (1987) (arguing sanctuary resolutions are local procedures for providing city services, are symbolic action, relate to law and order, and are a manner in which the city conducts local affairs). One city states that its sanctuary resolution was passed "in the interest of the City and County of San Francisco to encourage all residents . . . to report all criminal violations without fear of inquiry into immigration status." San Francisco, Cal., Res. *supra* note 2, at 1.

155. See *supra* notes 84-87 and accompanying text.

156. See *infra* notes 171-172 and accompanying text.

157. Helton, *supra* note 73, at 594-95.

158. 158 U.S. 532, 535 (1895).

159. *Id.* at 532-33.

160. *Id.* at 532.

to inform federal authorities of law violations.<sup>161</sup> The Court rejected this argument, holding: "It is the duty and the right, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting and in securing the punishment of any breach of the peace of the United States."<sup>162</sup> The Court further noted that the right of a citizen to inform federal officials of a violation of law "does not depend upon any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of activity."<sup>163</sup> *Quarles* equated the right of a citizen to "assist in putting in motion the course of justice" with the right of citizens to vote without being oppressed.<sup>164</sup> The existence of the right to aid federal authorities was reiterated in dicta in *Miranda v. Arizona*,<sup>165</sup> wherein the Supreme Court observed: "[i]t is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement."<sup>166</sup>

The right of an individual to cooperate with federal law enforcement authorities is not terminated merely because an individual is a city or state employee. The exercise by public employees of rights protected by the federal constitution cannot be the cause of dismissal,<sup>167</sup> disciplinary action,<sup>168</sup> or the withholding of benefits<sup>169</sup> by public employers absent those reasonable restrictions enacted to protect substantial government interests.<sup>170</sup>

Prohibitions against city or state employees cooperating with the INS are neither reasonably related nor necessary to the protection of

161. *Id.* at 533-34.

162. *Id.* at 535.

163. *Id.* at 536.

164. *Id.*

165. 384 U.S. 436 (1966).

166. *Id.* at 477-78.

167. *See, e.g.,* *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

168. *See, e.g.,* *Childers v. Independent School Dist. of Bryan County*, 676 F.2d 1338 (10th Cir. 1982) (involuntary transfer); *Swilley v. Alexander*, 629 F.2d 1018 (5th Cir. 1980) (reprimand); *Simpson v. Weeks*, 570 F.2d 240 (8th Cir. 1978) (negative evaluation), *cert. denied*, 443 U.S. 911 (1979); *Bernasconi v. Tempe Elementary School Dist.*, 548 F.2d 857 (9th Cir.) (reprimand), *cert. denied*, 434 U.S. 825 (1977).

169. *See, e.g.,* *Orr v. Thorpe*, 427 F.2d 1129 (5th Cir. 1970) (attendance at professional meetings denied); *Pred v. Board of Pub. Instruction*, 415 F.2d 851 (5th Cir. 1969) (tenure); *Lake Park Educ. Ass'n v. Board of Educ.*, 526 F. Supp. 710 (N.D. Ill. 1981) (summer school assignment).

170. *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (CIA's need to enforce secrecy agreement signed by former employee "compelling"); *Mt. Healthy City School Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979).

substantial local governmental interests. Assuming the acceptance of the government interests asserted as justification for such declarations—security, law and order, and establishing procedures for distributing city services—these interests are not advanced by prohibiting public employees from cooperating with the INS. Illegal aliens and sanctuary workers violating immigration laws are not immunized from federal prosecution merely because a city or state desires to provide them with public assistance or protect them from apprehension and prosecution by the INS. Moreover, whether or not a public employee cooperates with INS officials does not affect the procedures, forms, questionnaires, or policies sought to be implemented by a city or state regarding public assistance to illegal aliens. The local government, for example, can determine the type and number of inquiries on public assistance and service forms.<sup>171</sup> In sum, the prohibition against city and state employee cooperation with the INS is overbroad in relation to the governmental interests advanced by providing procedures for the distribution of city or state services or preserving, paradoxically, local law and order.<sup>172</sup>

By realistically appraising the interests of the city and state officials in passing prohibitions against public employee cooperation with the INS, the declarations lose any semblance of legitimacy. Seeking to facilitate evasion from prosecution by illegal aliens or sanctuary activists due to a belief that the INS is acting illegally or that the sanctuary activists merit our appreciation and support<sup>173</sup> is not an “important” state or local interest on which to anchor an ordinance banning a citizen’s right to cooperate with INS officials. It is, instead, merely a poorly disguised attempt to determine or regulate who should be admitted into the country—an exclusively federal

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171. Although Chicago’s Executive Order bans assisting in the investigation of the residency status of any person without legal authority, it also mandates that the applications, questionnaires, and interview forms used by the city be reviewed to delete any questions regarding citizenship or residency status not legally required. Chicago, Ill., Exec. Order, *supra* note 3, §§ 3, 6.

172. In *Lewis v. City of New Orleans*, 415 U.S. 130 (1974), the Supreme Court invalidated a city ordinance rendering it unlawful “to curse or revile or to use obscene or opprobrious language toward or with reference to police officers performing duties” for being overbroad, since it was “susceptible of application to protected speech.” *Id.* at 132. The sanctuary resolutions, moreover, could fail on the basis they are not reasonably related to local police power at all. Courts have not avoided determining whether a local ordinance or resolution is reasonably related to local police power or whether such regulation furthers a sufficiently substantial governmental interest when infringing upon first amendment interests. See, e.g., *Schad v. Mount Ephraim*, 452 U.S. 61, 68 (1981) (zoning ordinances infringed upon first amendment interests); *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 164 Cal. Rptr. 539, 610 P.2d 436 (1980) (city ordinance infringed upon the right to privacy); *Alves v. Justice Court*, 148 Cal. App. 2d 419; 306 P.2d 601 (1957) (general right to enjoy and engage in lawful and innocent activity is subject to reasonable restriction, but cannot be completely taken away under the guise of police regulation).

173. See *supra* notes 85-87 and accompanying text.

interest.<sup>174</sup>

*F. The Right Not To Speak*

Ironically, the very argument by proponents of sanctuary declarations that they are merely symbolic political gestures protected as free speech in fact undermines the constitutionality of a declaration's prohibition against employee cooperation with INS officials. In *Wooley v. Maynard*,<sup>175</sup> the Supreme Court held that a state cannot force an individual to be an instrument of an ideological point of view with which he disagrees.<sup>176</sup> In *Wooley*, a New Hampshire statute mandated that noncommercial motor vehicles bear license plates with the motto "Live Free or Die."<sup>177</sup> The appellees viewed the motto as repugnant to their moral, religious, and political beliefs, and covered up the motto on their license plates, for which they were subsequently convicted of a misdemeanor.<sup>178</sup> The Supreme Court upheld the district court's judgment that the state could not require the appellees to display the state motto on their vehicle license plates.<sup>179</sup>

In reaching its decision, the Court noted that the first amendment prohibition against state action includes both "the right to speak freely and the right to refrain from speaking at all."<sup>180</sup> In particular, the Court observed that the New Hampshire statute mandating "the passive act of carrying the state motto on a license plate" forced each appellee to be an instrument for "fostering public adherence to an ideological point of view he finds unacceptable."<sup>181</sup> In concluding that the statute was unenforceable against the appellees, the Court held that the state's asserted interest in determining whether a vehicle was carrying proper plates could be more narrowly achieved and that the state's interest in disseminating an official ideology cannot outweigh an individual's right to avoid becoming the courier for such a message.<sup>182</sup>

Analogously, the interest of a local or state governmental unit in disseminating a particular point of view—be it that the INS is illegally apprehending undocumented aliens or that the administration's

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174. See *supra* note 143 and accompanying text.

175. 430 U.S. 705 (1977).

176. *Id.* at 717.

177. *Id.* at 707.

178. *Id.*

179. *Id.* at 717.

180. *Id.* at 714.

181. *Id.* at 715.

182. *Id.* at 717.

Central American policies are misguided—cannot supercede an individual's right to avoid becoming the courier for such a view. By prohibiting a public servant's cooperation with INS officials as part of some sort of symbolic public speech, the pertinent ordinances or resolutions force each civil employee to acquiesce in what is essentially a strongly ideological viewpoint. A simple perusal of the preambles addressing the rationale for promulgating sanctuary declarations leaves no doubt that they were passed based on ideological motivations<sup>183</sup> which many will clearly disagree with on a factual as well as political basis.<sup>184</sup> Accordingly, those sanctuary resolutions or declarations that restrict city or state civil employees from aiding federal law enforcement officials turn such employees into the unwilling instruments of strong ideological statements and violate their first amendment right not to be an unwilling courier of ideological governmental statements, especially those which simultaneously restrict the exercise of a separate constitutional right.

## V. CURRENT LEGISLATIVE AND JUDICIAL ACTION

While the sanctuary activists have relentlessly continued their efforts to elicit support for their movement,<sup>185</sup> neither the federal legislative or judicial branch has been remiss in fulfilling their responsibilities regarding immigration.

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183. See *supra* notes 72-87 and accompanying text.

184. Ruffin, *supra* note 5, at 596-97 (the major allegations of the sanctuary movement are for all practical purposes false); Nelson, *supra* note 147, at 483 (facts belie sanctuary proponents' claim regarding persecution of Salvadorans and Guatemalans upon returning to their homelands); Zall, *Asylum and Sanctuary: The American Dilemma*, A.B.A. J., Aug. 1, 1986, at 68 (charges by sanctuary movement advocates about asylum law and policy are not substantiated). Regarding the refugees being publicized by sanctuary proponents, one of the movement's religious activists was reported "screening" refugees for suitability prior to use by the movement. "Sister Anna Marie, who screens refugees, says that she warns them that entering sanctuary is not easy or always safe, and that she chooses people she thinks are dedicated to change in Central America and can convincingly repeat their stories." Epstein, *The Long Trip To Sanctuary, 2,600 Miles on New 'Underground Railroad'*, *The Christian Sci. Monitor*, Sept. 25, 1986, at 7, col. 2. In one reported case, sisters believing they were helping Central American refugees were swindled out of over \$2,200. Wells, *Tipping Leads to Nun-Scam Arrest*, *The Cincinnati Enquirer*, Dec. 12, 1986, at A-1, col. 1. In another case, one city sanctuary resolution recommended sanctuary be given to a person who turned out to be a member of the Communist party of El Salvador, received guerrilla training in Cuba, met with Cuban and Soviet officials, and was determined to be a security risk by immigration officials. See *Council Passes Resolution Approving Sanctuary for Refugees*, *United Press Int'l*, Rochester, N.Y., May 28, 1986 (NEXIS library, Omni file); *Rochester Council Adapts Resolution Supporting Sanctuary Movement*, *The Associated Press*, Rochester, N.Y., May 29, 1986 (NEXIS library, Omni file).

185. On February 23, 1987, a caravan of sanctuary activists and Salvadoran refugees left San Francisco for a month-long trip through the nation to speak on sanctuary goals. See *People's Daily World*, Feb. 26, 1987, at S-A.

### A. *The Legislature*

After many years of heated discussion, the United States Congress finally tackled the issue of immigration reform by enacting the Immigration Reform and Control Act of 1986.<sup>186</sup> The Act grants amnesty to those aliens who entered the country before January 1, 1982, and establishes sanctions for those employers who hire undocumented aliens.<sup>187</sup> Due to its cutoff date, this major legislative effort fails to provide a solution for the majority of Salvadorans and Guatemalans who have recently immigrated illegally to the United States.<sup>188</sup> Immediately after the Act's passage, bills were introduced in both houses of Congress which would have granted Salvadorans and Guatemalans a temporary stay of detention and deportation.<sup>189</sup> However, both bills were neither debated nor approved.<sup>190</sup> On June 28, 1987, the House of Representatives passed legislation by a 237 to 181 margin temporarily deferring the deportation of Salvadorans and Nicaraguans illegally residing in the United States who entered the country before January 20, 1987, and extending the cutoff date to the end of a six-month registration period beginning on the date of the bill's enactment.<sup>191</sup> This legislation is now pending before the Senate. Critics of this bill argue that it will undermine the immigration reforms enacted in 1986 and that the Salvadorans are coming to the United States for economic rather than political reasons. Supporters of this bill reply that the politically motivated activities of the death squads in El Salvador are forcing these immigrants to leave their country.<sup>192</sup>

Another problem with the bill is that its cutoff date of January 20, 1987, is five years beyond that of the corresponding Immigration and Reform Act of 1986 cutoff date, opening the door for a chaotic, uncertain situation following the bill's six-month registration period.<sup>193</sup> Even if this bill ultimately becomes law, it will not resolve the ten-

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186. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

187. *Id.*

188. N.Y. Times, Dec. 21, 1987, at A3, col. 4.

189. See S. 332, 100th Cong., 1st Sess. (1987) (providing for the temporary stay of detention and deportation of Salvadorans and Guatemalans). The Senate bill was previously introduced in 1985 as S. 377, 99th Cong., 1st Sess. (1985). See also H.R. 1409, 100th Cong., 1st Sess. (1987) (provisions similar to Senate bill, but extended to include Nicaraguans). The House bill was previously introduced in 1985 as H.R. 822, 99th Cong., 1st Sess. (1985).

190. See 1988 Cong. Index (CCH), at 21,004, 35,019.

191. H.R. 618, 100th Cong., 1st Sess. (1987).

192. 64 Interpreters Releases 895 (Am. Council for Nationalities Serv. 1987).

193. See *supra* note 188 and accompanying text.

sions generated by sanctuary activists. The exodus of Salvadorans, Guatemalans, and Nicaraguans is expected to continue long after the registration period lapses.

### B. *The Judiciary*

The courts have also dealt with immigration matters related to the sanctuary movement. Their findings indicate that implementation of a congressionally chosen immigration scheme is an important government interest justifying enforcement of the law.<sup>194</sup> Further, the conviction of activists for transporting illegal Salvadorans is not barred by the first amendment.<sup>195</sup> Courts reject the perpetrators' belief in the aliens' genuine qualifications for asylum<sup>196</sup> as an adequate defense for the crime of transporting illegal aliens. Consequently, they deny refugee organizations the right to judicial relief for assisting illegal aliens.<sup>197</sup>

On the other hand, courts protect the due process and statutory rights of Salvadoran aliens who are taken into custody.<sup>198</sup> In one instance, a judge instructed the jury that confusion revolving around New Mexico's sanctuary declaration could be a valid defense for those accused of smuggling aliens into the country *for profit*,<sup>199</sup> while at the same time determining that the Refugee Act of 1980 was not a defense in that case.<sup>200</sup> The jury found the two defendants not guilty. It is precisely this type of conflict and confusion between federal and state law that prompted entrustment of immigration matters exclusively to the federal government. The supremacy clause should lay the matter to rest.

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194. *United States v. Elder*, 601 F. Supp. 1574, 1580 (S.D. Tex. 1985).

195. *United States v. Merkt*, 794 F.2d 950, 954 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1603 (1987).

196. *United States v. Merkt*, 764 F. 2d 266, 273 (5th Cir.), *reh'g denied*, 772 F.2d 904 (5th Cir. 1985).

197. *American Baptist Churches in the U.S.A. v. Meese*, 666 F. Supp. 1358 (N.D. Cal. 1987).

198. *Orantes-Hernandes v. Meese*, 56 U.S.L.W. 2633 (U.S. May 17, 1988).

199. In *United States v. Martinez*, No. 87-476 (D.N.M., Dec. 10, 1987), the judge instructed the jury "that the Sanctuary proclamation issued by New Mexico Governor Toney Anaya had no legal effect on the enforcement of the immigration law of the United States. *Id.* Further, the judge instructed that should they find:

the defendants committed the acts for which they have been charged . . . [they] must then consider [whether] in doing so, they acted in reasonable reliance upon the Governor's Sanctuary proclamation . . . You must acquit the defendants . . . unless you find beyond a reasonable doubt that they did not actually rely on the Governor's Sanctuary proclamation and that a reasonable person could have relied upon the proclamation.

*Id.* The judge also stated that "reasonable reliance means that a reasonable person would have acted in reliance upon the Governor's proclamation and reasonably believed that his actions were not contrary to Federal Law." *Id.*

200. *Id.* (Jury Instruction No. 29).

## VI. CONCLUSION

The sanctuary movement began as an ecumenical protest aimed at changing United States policy in Central America. Its emergence as a topic for municipal and state legislative and executive action is consistent with the aims of the sanctuary activists. The various declarations are likely to be cited by sanctuary proponents as independent examples of a public ground swell against current Central American foreign policy.<sup>201</sup> However, several factors prevent these declarations from being the proper subjects for legitimate local official action.

The nomenclature of the declarations indicate they were not independently forged after painstaking drafting and measured debate. More often than not, the declaration or resolution of one state or municipality simply mirrors that of another, indicating clause-borrowing among partisan sanctuary activists in local or state offices.<sup>202</sup>

Furthermore, federal law preempts these declarations. Federal statutes expressly give local law enforcement officials the authority to apprehend those illegally bringing aliens into the country and harboring them from federal authorities.<sup>203</sup> Accordingly, sanctuary resolutions or declarations prohibiting local law enforcement officials from apprehending these wrongdoers are invalid. Moreover, the Supreme Court expressly declares that determining who may remain in the country and under what conditions is an exclusively federal function;<sup>204</sup> yet, state and local sanctuary declarations unconstitutionally attempt to make such determinations.<sup>205</sup>

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201. Helton, *supra* note 73, at 493. "The breadth of support for this effort is indicated by the nineteen municipalities and the single state that have declared themselves safe havens, in one form or another, for Central Americans." *Id.* See, e.g., Takoma Park, Md., Res., *supra* note 2, at 3-4. "The American people are acting in opposition to these unjust policies . . . cities in independent actions have recently enacted resolutions . . . manifesting their solidarity with the Sanctuary Movement." *Id.* In contrast, in the only open public vote on a sanctuary resolution, the sanctuary resolution lost. See *supra* note 58 and accompanying text.

202. See *supra* notes 76-82 for sanctuary resolutions that are substantially similar to one another. Rochester passed its sanctuary resolution after a three-hour debate observed by a packed chamber of 200 people. *Rochester Council Adopts Resolution Supporting Sanctuary Movement*, The Associated Press, Rochester, N.Y., May 29, 1986 (NEXIS library, Omni file). An informative Los Angeles public committee hearing degenerated into a political forum to criticize Reagan administration policies which lead a panelist to assert that a new "sanctuary" lead policy could come from the committee. *Panel Studies Impact of Refugees on City*, United Press Int'l, Los Angeles, Cal., July 2, 1986 (NEXIS library, Omni file); *Reagan Policy Toward Central America Attacked*, United Press Int'l, Los Angeles, Cal., June 30, 1986 (NEXIS library, Omni file).

203. See *supra* notes 8-35 and accompanying text.

204. See *supra* note 143 and accompanying text.

205. See *supra* notes 143-153 and accompanying text.



Assuming one accepts the dubious claims of some proponents that these sanctuary declarations are legitimately addressing local concerns, they are in any event still unconstitutionally overbroad—especially those which prohibit civil employees from exercising their constitutional right to cooperate with the INS or other federal officials.<sup>206</sup> Likewise, these municipal and state sanctuary resolutions and declarations, which give their official imprimatur to the illegal activities of sanctuary activists, propound a distinctly partisan ideological viewpoint. By prohibiting state and local employee cooperation with the INS, the local governmental unit is thereby attempting to transform civil employees into couriers of a partisan viewpoint by restraining the employees' exercise of their free speech rights.<sup>207</sup>

Finally, neither Congress nor the courts have been remiss in living up to their responsibilities with regard to immigration. Congress has been working to change existing legislation, while in the meantime, the courts have been upholding existing law. These are precisely the forums where the treatment of this problem belongs.

It is indeed ironic that those who purport to truly uphold the law are instead intent on encouraging its disobedience, even to the point of advocating the passage of improper official dictates that are unconstitutional and violative of others' constitutional rights. Hopefully, other municipalities and states will take a more critical look at the entire sanctuary movement, including some of the movement's factual allegations, before passing similar invalid measures.

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206. *See supra* notes 154-174 and accompanying text.

207. *See supra* notes 175-184 and accompanying text.